

4. On September 26, 2008, the Bankruptcy Court issued an order discharging Complainant's debts under Chapter 7 and concluding the bankruptcy proceeding.

5. At no time during the pendency of his bankruptcy proceeding did Complainant disclose the charge of discrimination that he had filed against Respondent.

CONCLUSIONS OF LAW

1. Because Complainant did not disclose his discrimination claim against Respondent during his bankruptcy proceeding, the doctrine of judicial estoppel bars Complainant from proceeding on that claim before the Commission.

2. Respondent is entitled to a recommended order of dismissal as a matter of law.

DISCUSSION

According to Respondent, Complainant should be barred from prosecuting his discrimination claim against Respondent by the doctrine of judicial estoppel. Respondent argues that Complainant failed to disclose during his Chapter 7 bankruptcy proceeding the fact that he had filed a charge of discrimination against Respondent. As proof of Complainant's failure to disclose his claim against Respondent, Respondent has proffered a copy of Complainant's bankruptcy petition and attached schedules. (See Motion at Ex. C.) Schedule B of the petition required Complainant to list, among other assets, all "contingent and unliquidated claims of every nature." (Id.) A review of Schedule B reveals that Complainant listed an unrelated lawsuit regarding an alleged breach of a contract, but not his claim against Respondent. (Id.) Complainant also swore under penalty of perjury that he had furnished true and correct information in his petition. (Id.)

Respondent concedes that Complainant filed his charge of discrimination on August 25, 2008, which was after he had already filed his June 2008 bankruptcy petition. However, Respondent asserts that Complainant likely was aware of his potential claim against Respondent at the time that he filed his bankruptcy petition because the adverse job action about which he complains (*i.e.*, his May 13, 2008 suspension) predated his bankruptcy filing.

Furthermore, even if Complainant did not become aware of his claim until some point after his June 2008 bankruptcy filing, Respondent represents that Complainant never amended his bankruptcy petition to disclose his claim. Obviously, Respondent asserts, Complainant became aware of his claim no later than the date on which he filed his charge, which still was before the Bankruptcy Court's September 26, 2008 discharge of Complainant's debts.

In his response, Complainant does not dispute that he never disclosed his claim at any time during the bankruptcy proceeding, or that he had the opportunity and duty to do so. Complainant argues simply that the omission was a mistake, as he did not know at that time that his discrimination claim was an asset.

The doctrine of judicial estoppel seeks "to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." Sierzega and Ferranti Sckiaky, Inc., IHRC, ALS No. 5944, August 13, 1997, citing Levinson v. U.S., 969 F.2d 260, 264 (7th Cir. 1992). Judicial estoppel applies when five requirements are met: 1) the two positions at issue were taken by the same party; 2) the two positions were taken in judicial proceedings; 3) the two positions were taken under oath; 4) the party who took the two positions must have been successful in maintaining the first position and received some benefit therefrom; and 5) the two positions must have been totally inconsistent. Id.

All five requirements clearly are met in this case. Complainant's two positions (*i.e.*, that he had no claim against Respondent and that he does) were taken by him in the Bankruptcy Court proceeding and in this case. Also, Complainant's bankruptcy petition and charge of discrimination both were signed under oath. Furthermore, based on the assets that Complainant disclosed and/or withheld from disclosure, he received a clear benefit: a Bankruptcy Court order discharging his debts. Moreover, Complainant's two positions were totally inconsistent.

There does not appear to be any Commission precedent on the issue of whether a complainant's failure to disclose a claim in bankruptcy might preclude that claim under judicial

estoppel. However, there is federal precedent directly on point, and the Commission routinely looks to federal case law in the absence of Commission precedent. See, e.g., Anguish and Bank of Dallas City, IHRC, ALS No. S-8728, October 7, 1997; Johnson and Univ. of Ill. at Chicago Med. Ctr., IHRC, ALS No. 8624, July 23, 1997. When faced with a motion like Respondent's Motion here, the federal courts consistently have barred the undisclosed claim on judicial estoppel grounds.

For example, in a leading case on the issue, Cannon-Stokes v. Potter, 453 F.3d 446 (7th Cir. 2006), the Seventh Circuit affirmed a summary judgment in favor of an employer where an employee did not list her employment discrimination claim against the employer among her "contingent and unliquidated claims of every nature." The Seventh Circuit observed, "All six [other] appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends." Id. at 448 (citing cases from the First, Third, Fifth, Eighth, Ninth, and Eleventh Circuits).

As Complainant has asserted in the instant case, the appellant in Cannon-Stokes asserted that her failure to disclose her claim was not done in bad faith. Id. at 449. The Court was unmoved, noting that the reason for the omission was irrelevant so long as the debtor obtained the benefit (*i.e.*, the discharge) and "now . . . wants to contradict herself in order to win a second case." Id.; see also Becker v. Verizon North, Inc., No. 06-2956, 2007 WL 1224039, at *1 (7th Cir. Apr. 25, 2007) (holding appellant's undisclosed claim was judicially estopped despite the fact that her omission was unintentional, as "her subjective intent does not matter").

Finally, as Respondent has correctly noted, it is of no consequence that Complainant filed his charge of discrimination after he had already filed his bankruptcy petition. Because the charge predated the Bankruptcy Court's discharge order, Complainant had the opportunity and duty to amend his bankruptcy petition prior to the discharge of his debts. See Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 600 (5th Cir. 2005) (citing debtor's continuing duty to

amend her bankruptcy petition and holding that a post-petition EEOC charge was judicially estopped where that charge was never disclosed).

In sum, the test articulated by the Commission in Sierzega and well settled federal precedent compel the conclusion that Complainant's discrimination claim is barred by the doctrine of judicial estoppel. Accordingly, his case must be dismissed as a matter of law.

RECOMMENDATION

Based on the foregoing, Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that: 1) Respondent's Motion be granted; and 2) the complaint and underlying charge be dismissed in their entirety with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____

**LESTER G. BOVIA, JR.
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION**

ENTERED: November 19, 2010